Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ERNEST D. SUGGS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petiton for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(I)

WAS THERE AN ILLEGAL ARREST BASED ON THIS COURT'S PRECEDENT OF DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), WHEN THE PETITIONER WAS TRANSPORTED TO A POLICE SUBSTATION WITHOUT PROBABLE CAUSE AFTER BEING STOPPED AND QUESTIONED BY POLICE OFFICERS?

(II)

ARE CONSENTS TO SEARCH GIVEN BY THE PETITIONER AFTER BEING TRANSPORTED TO THE POLICE SUBSTATION THE PRODUCT OF PETITIONER'S ILLEGAL ARREST?

(III)

WERE THE RESULTING SEARCH WARRANTS AND EVIDENCE FOUND PURSUANT THERETO THE FRUIT OF ILLEGAL POLICE CONDUCT WHICH SHOULD HAVE BEEN SUPPRESSED?

(IV)

IS IT SUFFICIENT FOR POLICE OFFICERS TO REMAIN QUIET AND NOT INFORM A SUSPECT OF THE RIGHT TO LEAVE IN ORDER TO UNDERMINE THIS COURT'S PRECEDENT ENUNCIATED IN DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)?

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IN THE
SUPREME COURT OF THE UNITED STATES
February Term, 1995

Case No.:

ERNEST D. SUGGS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

Petitioner, Ernest D. Suggs, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered September 1, 1994.

CITATION TO THE OPINION BELOW

The decision of the Supreme Court of Florida in this cause appears as Ernest D. Suggs v. State of Florida, Case No. 80,340 (Fla. 1994), and is appended hereto as Appendix A.[1]

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[1] References to the record on appeal will appear as (R-page number). Petitioner is submitting an Appendix containing the primary documents relied upon in this petition, including the Florida Supreme Court Opinion (App.

JURISDICTION

The decision of the Supreme Court of Florida was published on September 1, 1994. Petitioner filed a timely petition for rehearing which was denied on October 25, 1994. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause . . . .

Section One of the Fourteenth Amendment provides in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law.

A); the Florida Supreme Court Order Denying Rehearing (App. B); the Order Denying Defendant's Motion to Suppress (App. C); the transcript of the Motion to Suppress (App. D); and the affidavits for search warrants (App. E).

STATEMENT OF THE CASE

On August 6, 1990, Pauline Casey, a barmaid at the Teddy Bear Bar ("Bar") located in Walton County, Florida, was suspected to be missing when another employee, Diane Hosmeier, went to the bar at 11:10 p.m. and found it empty, with no sign of Casey. Hosmeier observed Casey's personal effects in the bar and noticed that the "open" sign was displayed in the window. Hosmeier observed no sign of a struggle. (R-2227, 2316-17). Hosmeier then called the bar owner, Ted Valencia, who instructed her to call the police. Based on Hosmeier's phone call, the police arrived at the bar around 11:30 p.m. and questioned Valencia, who had also arrived at the bar. (R-2243). Valencia told the police that Ray Hamilton, Casey's neighbor, had been at the bar that night. (R-2682-83). Therefore, the police picked Hamilton up and brought him to the bar. (R-2323). Hamilton told the police that he had seen an individual at the bar when he left that night. (R-2684-85). Hamilton did not personally know the customer; however, he described the customer in general terms. Additionally, he described a vehicle which he believed was present at the bar when he left. (R-2684-85).

Based on this general information, police issued a "BOLO" for the vehicle which Hamilton described as a big dark colored jeep. (R-1363-64). Subsequently, a patrol officer, Deputy Russell Townsend, stopped the Petitioner for speeding at approximately 4:50 a.m. on the morning of August 7, 1992. Petitioner's vehicle fit the general description of the BOLO. (R-853-855; App. D). Petitioner's vehicle was pulled over at a convenience store. After stopping, Petitioner exited his vehicle and approached Townsend's patrol car. As Petitioner approached, Townsend placed his hand on his service revolver and commanded Petitioner to get back into his car and remain there.

Townsend called for assistance. Six officers and four police vehicles arrived at the scene and the officers began questioning Petitioner. (R-856-857, 884-887; App. D).

The officers took and retained possession of Petitioner's drivers license, keys, and automobile title. Then, one officer transported him to the police substation in the back of a police cruiser while another officer drove Petitioner's vehicle there. (R-858, 875, 890; App. D.). At the substation, police interrogated Petitioner about his knowledge of Casey's whereabouts. (R-875; App. D).

The Petitioner repeatedly denied any involvement with the girl's disappearance. (R-890-91, 896, 900; App. D). Nonetheless, the officers continued to interrogate the Petitioner and repeatedly stated that "our concern was to eliminate [sic] him from this incident at the Teddy Bear Bar." (R-895; App. D).

After the police interrogation continued for an hour and twenty-five minutes, the Petitioner finally signed a consent for the search of his home. Almost an hour later, a consent to search his vehicle was signed. (R-876-877; App. D). At no time during the traffic stop or subsequent detention at the Substation did the police tell the Petitioner that he was free to leave. The police testified:

> A. He could have left, yes, sir.
> Q. Okay, did you tell him that?
> A. I did not. (R-886; App. D).
>
> * * *
>
> Q. Did you advise him that he had the right to get up and leave?
> A. I did not, no. (R-890; App. D).

While Petitioner was being interrogated, based upon

his consent to search, the officers obtained tire impressions from Petitioner's vehicle using WD-40 and cardboard. Those impressions were provided to road deputies who began looking for similar tracks leading off of main roads. (R-2988-89). Meanwhile, the officers took Petitioner to his home and began searching his home where they found wet money in the bathroom sink. (R-880-81; App. D). While the search of the Petitioner's home was ongoing, the body of Pauline Casey was found off of a road that had tire tracks similar to those of Petitioner's vehicle. (R-2995-96). Thereafter, Petitioner was formally arrested while in his home at 8:56 a.m. on the morning of August 7, 1990. (R-2718, 2997).

Subsequently, relying upon the information gained by the police during the "consent" searches as the probable cause, search warrants were issued for the search of Petitioner's vehicle and home. (R-6-10; App. E). The search of Petitioner's vehicle revealed two of the victim's fingerprints on the exterior of the passenger window and one palm print on the inside of the passenger door handle. (R-3360). The subsequent search of Petitioner's home revealed a book entitled Deal the First Deadly Blow, which the prosecution claimed contained photographs of wounds similar to those of the victim in this case. A murder weapon was never found. (R-2689).

Petitioner was indicted on charges of first degree murder, kidnapping, robbery, and possession of a firearm by a convicted felon. He entered a plea of not guilty[2] (R-11 15) and filed pretrial motions to suppress evidence based upon Petitioner's illegal detention. (R-775, 787).

The trial court denied Petitioner's motions based on the following rulings: first, that the Petitioner "consented to

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[2] The possession of a firearm by a convicted felon was severed for trial purposes. (R-960).

accompany the law enforcement officers to the Substation;" second, that "even if an appellate court finds that this was not a consensual trip to the substation, the [Petitioner's] conduct at the substation created a valid waiver;" and third, that "based on the totality of the circumstances" the Petitioner's "consent was voluntary." (R-837-38; App. C). The trial court's third ruling rejected Petitioner's assertion that he was "without sleep [and] intoxicated," thereby not being able to give a valid consent. Instead, the trial court found that Petitioner was able to consent because if he was as "tired or drunk as he [asserted], it is reasonable to assume that he would have stayed home and slept." (R-838; App. C).

Petitioner's case then proceeded to trial resulting in guilty verdicts on counts I, II and III of the indictment. By a seven to five vote, the jury recommended the death penalty be imposed. (R-1756). On July 15, 1992, the trial court sentenced the Petitioner to death.

Petitioner then appealed his conviction and death sentence asserting that his detention was illegal as violative of the Fourth Amendment because no probable cause existed to detain him. Moreover, Petitioner argued that the consents he signed during the lengthy detention were the product of his illegal arrest. Without discussing any of this Court's controlling precedent, the Florida Supreme Court held that:

> At the time Suggs was stopped, no one even knew the victim was dead; the officers were looking for Suggs simply to determine if he knew the victim's whereabouts. Additionally, Suggs was legitimately stopped because he was speeding. Further, Suggs voluntarily agreed to accompany the officer to the station, even going so far as to show another officer how to drive his vehicle. Finally, once at the station, Suggs not

only voluntarily agreed to allow the officers to search his home--he did so only after reaching an agreement with the officers not to charge him with the illegal possession of weapons he kept at his home.

(Florida Supreme Court Opinion, p.8; App. A).

This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

(I)

THERE WAS AN ILLEGAL ARREST BASED ON THIS COURT'S PRECEDENT OF DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), WHEN THE PETITIONER WAS TRANSPORTED TO A POLICE SUBSTATION WITHOUT PROBABLE CAUSE AFTER BEING STOPPED AND QUESTIONED BY POLICE OFFICERS.

The Florida Supreme Court overlooked and failed to apply this Court's precedent of Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), and Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). When these precedents are applied, it is clear that Petitioner was illegally arrested without probable cause and that the resulting searches were a product of the illegal police conduct.

It is undisputed that at the time Petitioner was taken into custody, the police did not even know that a crime had been committed. (Florida Supreme Court Opinion, p.8; App. A). Thus, on appeal to the Florida Supreme Court, the state tried to justify Petitioner's stop based upon a claim that he was speeding; however, speeding is a traffic infraction under Florida law that does not subject a person to arrest. *See* Florida Statutes Sections 316.183, 318.14 & 318.18 (1994). It is also possible, as the Florida Supreme Court noted, that the police may have been looking for Petitioner based on the BOLO "simply to determine if he knew the victim's whereabouts." (Florida Supreme Court opinion at p.8; App. A). However, after police determined that the Petitioner had

valid identification, clear title to his automobile, and had answered their questions, he should have been allowed to leave absent probable cause that a crime had occurred and that Petitioner committed such crime.

This Court has declined to establish a bright line rule to determine when a valid police stop becomes an arrest. Instead, this Court has left this question open for courts to decide on a case-by-case basis. *See* United States v. Sharpe, 470 U.S. 675, 84 L. Ed 2d 605, 105 S. Ct. 1568 (1985) (holding that "[m]uch as a 'bright line' rule would be desirable, in evaluating whether an investigatory detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria" in the analysis). Lower federal courts have applied this test and found custodial arrest in many cases where the facts are less compelling than those in the instant case. *See* United States v. Martinez, 808 F.2d 1050, 1055 (5th Cir. 1987) (holding that a custodial arrest occurred when police transported suspects to the police station after an investigative automobile stop); United States v. Richardson, 949 F.2d 1416, 1420 (6th Cir. 1991) (holding that a custodial arrest occurred when the police placed the suspect into a police cruiser after he refused to consent to a search of his locker); and United States v. Novak, 870 F.2d 1345, 1350-53 (7th Cir. 1989) (holding that a custodial arrest occurred when six to nine officers moved the detainee from a public place into a closed room with windows and did not tell him he was free to leave).

Moreover, this Court has held that the involuntary removal of a suspect to a police station and his detention there for "investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization" cannot be sustained against Fourth Amendment Challenge. Hayes v. Florida, 470 U.S. 811, 84 L.

Ed. 2d 705, 105 S. Ct. 1643 (1985).

Hayes was suspected of burglary and robbery and the police went to his home to ask him questions. The police told Hayes that if he did not cooperate with the taking of fingerprints at the police station, he would be arrested. Hayes then "consented" to accompany police to the station for fingerprinting. When Hayes' prints matched those found at the victim's home, Hayes was arrested. The state appellate court declined to suppress the evidence as the fruit of an illegal detention.

This Court granted certiorari and reversed based upon Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969) (holding that fingerprints obtained from Davis without probable cause after he was detained were the fruits of an illegal search). Davis and subsequent cases uphold the doctrine that "transportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment." Hayes, 470 U.S. at 815, 84 L. Ed. 2d at 709, 105 S. Ct. at 1647. In Hayes, this Court reasoned that "at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." Id. This Court further held that "[w]e adhere to the view that such seizures . . . are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause." Id.

In assessing whether police activity is qualitatively and quantitatively an arrest, this Court emphasized in Sharpe *discussed supra*, that police must pursue a means of investigation that is likely to confirm or dispel their suspicions quickly. United States v. Sharpe, 470 U.S. 675, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985). In regards to whether

probable cause is required for an overly broad detention, this Court has held:

> [A] police confinement [seizure] which . . . goes beyond the limited restraint of a Terry investigatory stop may be constitutionally justified only by probable cause.

Florida v. Royer 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). *See also* United States v. Hastamorir, 881 F.2d 1551 (11th Cir. 1989) (holding that if the totality of the circumstances indicates that an encounter has become too intrusive to be classified as an investigative detention, the encounter is a full-scale arrest and the government must establish that the arrest is supported by probable cause). Moreover, this Court has defined seizure as follows:

> Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In the instant case, once the police placed the Petitioner into the police cruiser he was effectively seized because he could not walk away. The confinement was especially compelling here because the police never returned Petitioner's keys, drivers license or automobile title and the Petitioner was never told he could leave. At no time during the road stop or the subsequent interrogation at the police station did the police have the requisite probable cause to effect such an extended police confinement.

This Court has steadfastly protected Fourth Amendment rights in cases similar to the instant case. Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), is directly on point. In Dunaway, police officers received information from an informant that Dunaway may have been involved in the killing of a pizza parlor proprietor. Although the information did not constitute probable cause, one of the police officers ordered Dunaway brought to the station. Dunaway was taken from a neighbor's home and transported to the police station. Following Miranda warnings, the petitioner incriminated himself and was arrested.

Originally, this Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2674, 45 L. Ed. 2d 416 (1975) (holding that statements made after an illegal arrest were inadmissible notwithstanding Miranda warnings because there was no intervening event between the first statement and the subsequent statement). Upon remand, the trial court suppressed Dunaway's statements; however, the state appellate court reversed, reasoning that:

> Law enforcement officials may detain an individual upon reasonable suspicion for questioning for a *reasonable and brief period of time under carefully controlled conditions* which are ample to protect the individual's Fifth and Sixth Amendment rights.

Dunaway, 442 U.S. at 206, 60 L. Ed. 2d at 831, 99 S. Ct. at 2254-55.

This Court again reversed despite the state's argument

that the seizure of Dunaway did not amount to an arrest because the police had a reasonable suspicion that he possessed intimate knowledge of a serious crime. Dunaway, 442 U.S. at 207, 60 L. Ed. at 832, 99 S. Ct. at 2255-56. This Court focused instead on the Fourth Amendment's requirement of probable cause for arrest and held that such requirement is absolute because it embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." Id. *citing* Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 2d 1879 (1949). Such reasoning alleviated the need to balance the interests and circumstances involved in particular situations. Id.

This Court has recognized the need for permitting only narrow exceptions to the Fourth Amendment and these exceptions must be based on clear and legitimate law enforcement needs. For instance, in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), this Court allowed a brief, on the spot, stop and frisk for weapons. Similarly, investigative stops at border crossings which involve "a brief question or two" have been upheld by this Court. United States v. Brignoni-Ponce, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). However, in Terry this Court noted that even such a brief encounter constituted a "serious intrusion . . . upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." Terry, 392 U.S. at 20, 20 L. Ed. 2d at 909, 88 S. Ct. at 1888-89.

With this in mind, in Dunaway, this Court reasoned that, in contrast to the brief and narrowly circumscribed intrusions involved in Terry and Brignoni-Ponce, the detention of Dunaway was "in important respects indistinguishable from a traditional arrest." Dunaway, 442

U.S. at 212, 60 L. Ed. 2d at 835, 99 S. Ct. at 2250. In reaching that conclusion, this Court focused on the following factors: first, Dunaway was taken from a neighbor's house and put into a police car; second, he was transported to the police station; third, he was placed into an interrogation room; and fourth, he was not told that he was free to leave. This Court held that, under these circumstances, permitting an exception to the warrant requirement "would *threaten to swallow the general rule* that Fourth Amendment seizures are 'reasonable' only if based on probable cause." Dunaway, 442 U.S. Ct. 213, 60 L. Ed. 2d at 836, 99 S. Ct. at 2250-51.

The instant case is more compelling than Dunaway. Consider the following: the Petitioner was stopped by a uniformed patrol officer using blue lights (R-854-55; App. D); four patrol cars and as many as six police officers surrounded Petitioner at the scene (R-887; App. D); Petitioner was never given an option other than to go with the police officers to the substation (R-R-907-08, 920; App. D); Petitioner was not allowed to drive his automobile to the police station and instead was put into a caged police car and transported to the substation (R-907, 888; App. D); the police secured and never returned Petitioner's automobile keys, drivers license and automobile title (R-858, 890; App. D); Petitioner was taken to the substation and told that he was the last to be seen with the missing girl (R-875; App. D); and he was repeatedly told that the police needed to eliminate him from their inquiries surrounding the disappearance of the girl (R-880, 895-97; App. D). All of these events occurred at a time when, unlike in Dunaway, there was no evidence that any crime had in fact been committed.

Another case directly on point is Florida v. Royer 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). Royer was detained at Miami International Airport after Dade County detectives noticed that he fit the drug-courier profile.

Royer 460 U.S. at 493, 75 L. Ed. 2d at 233, 103 S. Ct. at 1321. The officers approached Royer and asked if he had a moment to speak with them. Royer then went with the officers into a "large storage closet" approximately forty-feet away. Royer 460 U.S. at 494, 75 L. Ed. 2d at 234, 103 S. Ct. at 1322. During the detainment, Royer's plane ticket and identification were taken away from him and held by the officers. Id. Thereafter, the police officers asked whether Royer would consent to a search of his luggage and he produced a key for one suitcase and stated that he did not know the combination to the other suitcase. Id. The officers then opened the suitcases which contained marijuana. This entire incident, from detainment to arrest, took approximately fifteen minutes.

The state appellate court reversed the conviction holding that Royer had been involuntarily confined without probable cause and that the detainment had exceeded the limited restraint permitted by Terry. Royer 460 U.S. at 495, 75 L. Ed. 2d at 235, 103 S. Ct. at 1323-24. The state appellate court reasoned that respondent's confinement was tantamount to arrest because he "found himself in a small enclosed area being confronted by two police officers -- a situation which presents almost a classic definition of imprisonment." Id. *citing* Royer v. State, 389 So.2d 1007, 1018 (Fla. 3d DCA 1980). More importantly, and relevant to the present case, is that the state appellate court found that "the detective's possession of Royer's airline ticket and their retrieval and possession of his luggage made it clear . . . that Royer was not free to leave." Id. Thus, the state appellate court concluded not only that respondent had been seized when he gave consent to search his luggage, but also that the bounds of an investigative stop had been exceeded. Royer 460 U.S. at 501, 75 L. Ed. 2d at 239, 103 S. Ct. at 1324-30. Subsequently, this Court granted certiorari and affirmed,

holding that any evidence found pursuant to the search must be suppressed because the consent to search was given during an illegal detention.

In the instant case, the Petitioner's situation is analogous to the respondent in Royer. Indeed, just as Royer felt he was not free to leave because the police had secured his airline ticket and luggage, the Petitioner here felt that he was not free to leave because the police at no time returned any of his possessions which would have enabled him to drive away. Moreover, the police never told him that he could leave nor that he had a right to do so. Thus, just as in Dunaway and Royer, the Petitioner's detention was tantamount to arrest without probable cause and the evidence should have been suppressed.

The Florida Supreme Court failed to follow this Court's clear precedent and instead summarily affirmed Petitioner's conviction and sentence holding that he "voluntarily agreed to accompany the officer to the station." (Florida Supreme Court opinion at p.8; App. A). Although the Florida Supreme Court states that Petitioner "voluntarily agreed" to go with the officers, it is interesting to note that this "voluntary trip" was accomplished by placing Petitioner in the backseat cage of a marked police car after he was surrounded by an enormous police presence consisting of at least six police officers and four police cars. Indeed, if the trip to the police station was truly "voluntary," then Petitioner's car, car keys, and title should have been returned to him and he should have been permitted to drive himself to the station. One way or the other, Petitioner should clearly have been given the option to accompany the officers to the station or to proceed on his way. Here, Petitioner was never told he could drive away and never given any option other than to accompany the officers to the station. (R-886, 907, 920; App. D). Under the circumstances, it is clear that

Petitioner did not "voluntarily" go with the officers any more than Royer "voluntarily" accompanied the officers in his case. Both had no viable option other than to accompany the officers because their means of transportation were taken from them.

The Florida Supreme Court noted that "[a]t the time [Petitioner] was stopped, no one even knew the victim was dead; the officers were looking for [Petitioner] simply to determine if he knew the victim's whereabouts." Id. Indeed, it is clear from the record that Petitioner could have been questioned regarding his knowledge of Casey's whereabouts at the scene of the stop. During the stop, the Petitioner provided police with valid identification so he could be located for subsequent questioning should the police determine a need to do so. The record clearly reveals that Petitioner gave all this information prior to the police requiring him to accompany them back to the police Substation.

Compared to the fifteen minute detention in Royer and the fact that police took possession of Petitioner's articles[3] which would have allowed him to leave, the instant case presents an illegal detention in all respects indistinguishable from formal arrest. The Florida Supreme Court failed to apply or, in the alternative, failed to distinguish this Court's holdings in Dunaway and Royer.

Because all persons should be afforded the same protection from illegal arrests without probable cause, this Court should grant the writ and remand to the Florida Supreme Court for proper application of this Court's established precedent.

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[3]The police officers never explained why Petitioner's keys, drivers license, and automobile title were not returned to him.

(II)

THE CONSENTS TO SEARCH GIVEN BY THE PETITIONER AFTER BEING TRANSPORTED TO THE POLICE SUBSTATION WERE THE PRODUCT OF PETITIONER'S ILLEGAL ARREST.

Having established that the Petitioner was illegally detained in the present case, the next issue is whether his consent to search was a product of the illegal arrest. The police obtained the consents to search only after prolonged questioning without any intervening factors which may have broken the causal connection between Petitioner's prolonged detention, and his consents. The prosecution has the burden to establish: 1) a break in the chain of illegality; and 2) that the consents were not the product of coercion, either express or implied. Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 13127, 75 L. Ed. 2d 229, 237 (1983), *See also* Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S. Ct. 1788, 1793, 20 L. Ed. 2d 797, 782-83 (1968), and Schneckloth v. Bustamonte, 412 U.S. 218, 222, 93 S. Ct. 2036, 2051, 36 L. Ed. 2d 857 (1973).

This Court has delineated three criteria to be examined in determining whether or not the chain of illegality was broken. Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). First, the temporal proximity of the detention and the consent must be examined. Here, the "consents" were the product of the uninterrupted detention and interrogation of Petitioner. Once the "temporal proximity" is met, the second element is whether or not any intervening factors have been shown. If no intervening factors are present, there is nothing to break the causal connection between the illegal detention and consent thereby obtained.

In the instant case, the state offered no evidence of any break in the chain of illegality. To the contrary, all of the evidence shows that Petitioner was taken into custody and detained until he signed the consents. During the detention, the police repeatedly asked for consents to search his home and automobile. Thus, the temporal proximity of the detention and the consent were contemporaneous because nothing intervened to break the causal connection between the illegal detention and the consents.

The third element enunciated in Brown is the purpose and flagrancy of the official misconduct. This element is more than satisfied. It is undisputed that the police did not have reason to arrest the Petitioner when he was stopped and taken to the police substation. The police had neither probable cause nor any reasonable articulable suspicion that the Petitioner had committed any crime. The police action was specifically directed at interrogating the Petitioner while he was illegally detained in hopes of gaining consent to search or a confession. In sum, the police activity was nothing more than a "fishing expedition."

In United States v. Garnier, LEXIS 17334 (6th Cir. 1994), the appellee was stopped for "erratic driving." The officer initiated field sobriety tests and found them to be negative; however, during the tests he noticed that a second person in the car was reaching into a bag. The officer asked to search the bag but found no contraband. The officer then asked if he could search the trunk and the appellee said "go ahead and search it . . . ." Id. The officer found crack cocaine and arrested the appellee. The district court suppressed the evidence, a ruling affirmed by the Sixth Circuit, holding that the search of the trunk "violated the Fourth Amendment because it was not reasonably related in scope to the circumstances which justified the initial interference with the [appellee's] liberty." Id. The Sixth

Circuit gave great deference to the fact that the police officer never told appellee that he could refuse to give consent to search and still be free to leave. As a result, the Sixth Circuit reasoned, the defendant had no alternative but to submit to further searches and seizures and that the official misconduct was nothing more than an attempt to engage in a fishing expedition for evidence of illegal activity. Garnier at 17334. *See also* United States v. Mcswain, 29 F.3d 558, 560 (10th Cir. 1994) (holding that a subsequent search of appellant's trunk was unjustified where the initial stop was to validate a temporary license expiration date. Such further detention "exceeded the scope of the stop's underlying justification"); and United States v. Sandoval, 29 F.3d 537 (10th Cir. 1994) (holding that appellant's consent to search of automobile was invalid because of police officer's extended detention after he had previously determined that the appellant had a drivers license and registration).

Thus, a police officer may not go on a fishing expedition after the purpose of the initial stop is met. More importantly, if the police go beyond the reason justifying the initial stop, the state must show that the consent was not a product of the illegal detention. There is simply no reason why Petitioner could not have been questioned at the scene of the stop regarding his knowledge of the whereabouts of Casey and thereafter permitted to go on his way. Instead, the officers took Petitioner into custody on an obvious "fishing expedition" in the hope of obtaining his consent to search or a confession.

Because there is no break in the chain of illegality, the consents are the product of illegal police activity and the fruits of the resulting searches must be suppressed. Suppression is required, even if the consents to search were voluntarily given during an illegal detention. *See* United States v. Chavez-Villarreal, 3 F. 3d 124 (5th Cir. 1993); United

States v. McCraw, 920 F. 2d 224 (4th Cir. 1990); United States v. Maragh, 894 F. 2d 415 (D.C. Cir. 1990).

Even if this court finds the consents to search were not a product of Petitioner's illegal arrest, the consents were involuntary as a matter of law. While it is undisputed that a search may be conducted without a warrant or probable cause if it is conducted pursuant to consent, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854 (1973), it is clear that any consent must be voluntary and not the product of express or implied coercion. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797. In determining whether a consent is voluntary, a court must:

> "consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."

Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Thus, no single criterion will suffice to determine whether a consent is voluntary. Instead, this Court reviews the totality of the circumstances to determine if a reasonable person would believe that he or she was free to leave. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2051, 36 L. Ed. 2d 862 (1973). Paramount in determining the voluntariness of a consent is the length of the detention and the nature of the questioning. Id. 412 U.S. at 226, 93 S. Ct. at 2049, 36 L. Ed. 2d 870. Additionally,

lower courts have held that where the police fail to tell a defendant that he is free to go and retain control of his registration and title, a consent to search is involuntary. *See* United States v. Gonzalez, 763 F.2d 1127, 1133 (10th Cir. 1985).

The facts in the present case clearly indicate that Petitioner's consent was not voluntary. Petitioner had been detained for a prolonged period of time, the questions were directed exclusively to the whereabouts of a missing person, the police did not tell the Petitioner that he was free to leave, and the police retained exclusive control over the Petitioner's keys, drivers license, and automobile title. The Petitioner was never advised of his Miranda rights (R-889-90; App. D) and was held at the police station until he signed the consents. The opinion of the Florida Supreme Court notes that Petitioner would not sign the consents until "after reaching an agreement with the officers not to charge him with the illegal possession of weapons he kept at his home." (Florida Supreme Court Opinion at p.8; App. A). This finding clearly reflects the coercive nature of the police activities--the officers guaranteed Petitioner immunity from criminal prosecution, if his consent was forthcoming! To add insult to injury, Petitioner was charged with possession of the firearms found in his home.

The Petitioner in the instant case consented to the searches only after his illegal detention for over two hours. If a consent to search "was preceded by a Fourth Amendment violation, the [state] bears a heavier burden of proof." United States v. Richard, 994 F.2d 244 (5th Cir. 1993), *citing* United States v. Ruigomez, 702 F.2d 61, 65 (5th Cir. 1983). The Florida Supreme Court summarily affirmed the Petitioner's conviction notwithstanding the clear Fourth Amendment violation. The state offered no proof that his consents were voluntary, other than the fact that Petitioner

signed the consents after hours of interrogation.

It is clear that there was no break in the causal chain between Petitioner's illegal arrest and the execution of the consents to search. Accordingly, the consents were a product of the illegal police activity and otherwise involuntary as a matter of law. The evidence seized by the police utilizing those consents to search must be suppressed.

(III)

THE RESULTING SEARCH WARRANTS WERE THE FRUIT OF ILLEGAL POLICE CONDUCT AND THE EVIDENCE SEIZED THEREBY SHOULD HAVE BEEN SUPPRESSED.

After Petitioner's arrest, the police obtained search warrants for both his home and automobile. The probable cause affidavits for both warrants are identical. Those affidavits refer to the consents to search obtained during the Petitioner's illegal detention and rely upon the fruits of the consent searches to establish probable cause for issuance of the search warrants. The probable cause affidavits refer specifically to the money found in Petitioner's bathroom sink as well as tire tracks found at the crime scene which "resembled" those taken from Petitioner's automobile while he was illegally detained. (R-6-10; App. E). This is clearly "fruit of the poisonous tree" concerning which this Court has held, "[t]he exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." Wong Sun v. United States, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441, 454 (1963). Although Wong Sun dealt with verbal evidence, this Court has held "[n]or do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence." Id.

It is true that not all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Id. 371 U.S. at 488, 9 L. Ed. 2d at 455, 83 S. Ct. at 424. Rather, this Court has held that the question turns on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation

of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. Thus, in Wong Sun, the admissions of Wong Sun were admitted because, although his initial arrest was without probable cause, the admissions were the result of his "return[ing] voluntarily several days later" after being released "on his own recognizance after a lawful arraignment." Id. 491; 457. Applying that rationale to the present case, it is clear that the evidence obtained through execution of the search warrants should have been suppressed as fruits of the illegal arrest.

There was a clear chain of circumstances leading from Petitioner's illegal arrest to the execution of the consents to search. Based upon those consents to search, the officers took tire prints from Petitioner's vehicle and found wet money in his home. These facts were then incorporated in the subsequent search warrants to establish probable cause[4] for the search warrants to be issued. Under these circumstances, nothing occurred that would dissipate the "primary taint," i.e., the illegal arrest, and all evidence derived from the consent searches and the search warrants should be suppressed as "fruit of the poisonous tree."

Additionally, in the instant case, there was no "independent source" for the issuance of the search warrants. In Segura v. United States, 486 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), this Court upheld a subsequent search

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[4] There is an allegation in the probable cause affidavits that "[t]here appears to be blood located on the passenger side of the green jeep." (R-8, 10; App. B). The crime laboratory conducted a test on the vehicle which was negative for blood. The officer who prepared the search warrant affidavit testified he could not remember whether he knew there was no blood on the car before preparing the search warrant. (R-898-99; App. A).

warrant obtained after an initial illegal entry. In that case, agents illegally entered the defendant's home and observed drugs in plain view. The agents then secured the premises and obtained a search warrant and the subsequent search was upheld. However, this Court made it clear that the validity of the search warrant was premised on the fact that

> "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioner's apartment . . . No information obtained . . . was needed *or used by the agents to secure the warrant.*

Id. 468 U.S. at 814, 104 S. Ct. at 3398, 82 L. Ed. 2d 617 (*emphasis added*).

Unlike Segura, in the case at bar, the evidence that was secured illegally during Petitioner's detention is precisely the evidence the police relied upon to obtain the search warrants. As a result, all evidence obtained through the search warrants should be suppressed.

(IV)

IT IS NOT SUFFICIENT FOR POLICE OFFICERS TO REMAIN QUIET AND NOT INFORM A SUSPECT OF THE RIGHT TO LEAVE IN ORDER TO UNDERMINE THIS COURT'S PRECEDENT ENUNCIATED IN DUNAWAY V. NEW YORK, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), AND FLORIDA V. ROYER, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

As discussed above, in determining whether a consent to search is voluntary, consideration must be given to all circumstances surrounding the encounter, Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); however, of critical importance is whether or not a person knows that he or she is free to leave.

Similar to Garnier, Royer and Dunaway discussed *supra*, the police officers in the instant case never advised Petitioner that he was free to leave. (R-890). Instead, like the respondent in Royer, at all times the police had possession of his effects which made it impossible for him to leave. Although the police testified that Petitioner was free to leave, this statement defies logic given the totality of the circumstances. Without an express statement from the police, it was entirely reasonable to assume that the Petitioner did not think he was free to leave. This Court was cognizant of this dilemma in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), and tried to solve the problem by requiring application of a three prong inquiry. However, an issue that remains unanswered is whether or not the police should inform a person that he or she is free to leave. This Court has not directly addressed whether the police should make an affirmative statement to

a person, detained for questioning, that he or she is free to leave. To resolve this ambiguity, this Court should further clarify its holding in Brown by requiring police officers to affirmatively state that a suspect is free to go. By not mandating such a requirement, police officers may usurp this court's holding in Royer by self-serving statements that a suspect was free to leave, when such was never communicated to the detainee; indeed, that is exactly what occurred in the present case. Because the Fourth Amendment is critical to balancing the needs of the citizenry against the arbitrary acts of law enforcement, this Court should grant Petitioner's writ and clarify the law requiring law enforcement to affirmatively advise a detainee of his right to leave police custody.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark C. Menser, Assistant Attorney General, Office of Attorney General, The Capital, Tallahassee, Florida 32399-1050, this 23rd day of February, 1995.

Attorney